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In The

Supreme Court of the United States

October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

I. IN NON-WARRANT CASES, SHOULD APPELLATE COURTS CONDUCT A *DE NOVO* STANDARD OF REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH?

PARTIES TO THE ACTION BELOW

All parties are contained in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 55-73) is reported. *United States of America v. Ismael Ornelas-Ledesma and Saul Ornelas*, 16 F.3d 714 (7th Cir. 1994), decided February 10, 1994. The court's post remand decision (J.A. 91-92) is unpublished. *United States of America v. Saul Ornelas, Ismael Ornelas Ledesma*, 52 F.3d 328 (7th Cir. 1995), decision and order dated April 18, 1995. The district court's initial opinion (J.A. 28-36) is unreported. The district court's post remand decision, (J.A. 85-90) is unpublished.

The magistrate judge's initial recommendation (J.A. 7-27) is unreported. The magistrate judge's post remand recommendation (J.A. 76-84) is unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit post remand decision is dated April 18, 1995.

A petition for *certiorari* was timely filed on July 17, 1995 and was granted on November 6, 1995. This Court is reviewing the decisions of the United States Court of Appeals for the Seventh Circuit, in a criminal case, by writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioners were charged in a one-count indictment with possession with intent to distribute approximately 2,000 grams of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (R.4.) Petitioners challenged the stop, whether there was consent to search, the scope of the search, the arrests and the statements. (R. 12) (R.[14]) (Bracketed numbers refer to docket numbers for Saul Ornelas). Evidentiary hearings were held over the course of four days.

The matter before the Court emanates from a suppression motion. Milwaukee County Sheriff's agents seized cocaine after obtaining consent to "look through" the vehicle, and after effectuating a more intrusive, partial vehicle dismantlement. (Tr. at 151) The reasonable suspicion for the stop consisted of the articulated facts as developed through the course of the suppression hearing below.

As Milwaukee County Sheriff's Detective Michael Pautz conducted drug interdiction activities at 8:30 a.m. in the morning of December 11, 1992, he observed a two-door 1981 Oldsmobile bearing California plates parked in front of Room 4 of the Suburban Motel, 4600 S. 27th St., Milwaukee, Wisconsin. (J.A. 9)

Pautz testified that he believed that older two door GM vehicles were often used to transport drugs, and viewed California, along with Arizona, Florida, Texas and New York, as source states for controlled substances. (Tr. at 62) (J.A. 9) Pautz also believed other older two door cars to be suspect. He further noted that even newer model Chryslers and Fords were deemed suspect. (Tr. at 63-64)

Pautz contacted his dispatcher to run a check on the plates. The dispatcher advised that the vehicle was listed to Miguel Ornelas of 830 North 16th Street, San Jose, California with an additional name of "Ledesma." (J.A. 9) At the time of the evidentiary hearing, Pautz was unsure whether the dispatcher indicated that the name "Ledesma" came before or after the name "Ornelas." (J.A. 10) At the time of the stop, however, he believed the last name to be "Ornelas." (Tr. at 105)

After speaking with the dispatcher, Pautz then spoke with the motel clerk who disclosed that at 4:00 a.m. that morning, an individual named Ismael Ornelas had checked into room 4 with another individual, without prior reservations, and was due to check out at 11:00 a.m. (J.A. 10)

Approximately 20 minutes after receiving the information from the dispatcher, Pautz's partner, Detective Don Hurrle, arrived. Pautz called the Milwaukee DEA office and asked for a Narcotics and Dangerous Drug Information Systems, (hereinafter referred to as NADDIS), check on the names "Ismael Ornelas and Miguel Ledesma Ornelas." (J.A. 10) The check was made

by car phone with all the information being relayed verbally.

A short time later, Pautz was advised that both names appeared on NADDIS and was given the following information: "Miguel Ledesma Ornelas, also known as Miguel Ledesma-Lemus, with a date of birth of September 29, 1945, 5'6", 150 pounds, Hispanic male was a heroin dealer from El Centro, California; Ismael Ornelas, Jr., from **Tucson, Arizona** was a 1,000 kilogram a month cocaine dealer." (Tr. at 35) (Emphasis added) Pautz was not familiar with the geography of California and did not know that San Jose and El Centro, California are 600 miles apart. (J.A. 10)

There were no wants or warrants for either name listed in the NADDIS. (J.A. 58) Pautz stated, "And these were just names that we had received. Not necessarily the people that could have been in the room." (Tr. at 35) Pautz was asked if he checked the DOB of the registered owner of the car to determine whether it matched the DOB which had been received from NADDIS. He responded, "I didn't have the date of birth. Or I would have done it." (Tr. at 57) He was then asked if he attempted through his dispatcher to get the DOB of the registered owner of the car. He responded, "All 50 states are different, and I didn't call, have them call California because I didn't think that they could get that information from California, and I don't know that they could today." (Tr. at 58)

Detective Hurrle was similarly asked what he did to determine if the registered owner of the car and the NADDIS hit were the same person, in that one person

was from San Jose and the other from El Centro. He responded, "Nothing. We didn't know his date of birth at the time." (Tr. at 327)

Sergeant Robert Wiggins, of the Milwaukee County Sheriff's Department, who was in charge of the communications bureau, second shift, testified that his bureau routinely runs Department of Motor Vehicle computer checks using state license plate numbers to obtain the owner's name, residence, and the make of car to which the license is listed.

In response to a request by the defense in preparation for the suppression hearings, he ran the license plate on the 1981 Oldsmobile in question and found it registered to Miguel Ornelas, also known as "Ledesma Miguel Ornelas." He also received the date of birth and other identifying information for the registered owner of the Oldsmobile by running a second "administrative" request (J.A. 16) The registered owner had a date of birth of September 19, 1963. (Tr. at 362)

At the hearing, Wiggins affirmed that "All the police officers on the street know about the system and know how it's used, and use it on a regular basis." (Tr. at 358)

Deputy Sheriff Gil Pagan testified that the vast majority of persons of Spanish descent who use the last names of their parents, use the father's name first, followed by the mother's maiden name. Pagan confirmed that the sheriff's department "never made any attempts to train their officers as to this potential problem." (Tr. at 291)

Of further interest was the fact that the officers recovered the certificate of title from the car. The name on the certificate was "Ornelas, followed by the word Miguel, followed by the word Ledesma." (Tr. at 291) According to Pagan, the person's name would be Miguel Ornelas Ledesma. (Tr. at 292)

Shortly after obtaining the information from NADDIS, Detective Lyle Luedke and his drug sniffing dog were summoned. Pautz testified, "It was not necessarily our intent to use the dog. We merely wanted to have that dog available." The officers saw nothing unusual during the surveillance. (Tr. at 330)

At about the expected time of departure, Luedke and Hurrle observed two people exit room 4. One individual loaded the trunk with luggage. (Tr. at 305) A few minutes later both men got into the car. The officers then moved their own vehicles to either side of the suspect vehicle. (Tr. at 306)

Hurrle identified himself and requested identification of both individuals. Saul Ornelas produced a California driver's license and Ismael Ornelas-Ledesma gave a license showing an address of 3979 Alhamra Avenue, Martinez, California, 94553. Ismael Ornelas-Ledesma said they had just gotten in from California. (J.A. 12).

Hurrle retained possession of the licenses of both individuals. (J.A. 12) Hurrle then asked if they were in possession of any contraband or drugs. Both "responded almost simultaneously, they had nothing illegal or anything like that." (J.A. 12) Hurrle asked if he "could look through the vehicle," and the driver said "sure." (Tr. at 151)

While Luedke was searching the interior, Saul Ornelas "started to walk away, 15, 20 feet towards the motel office and I [Hurrle] asked him where he was going, and would he please come back. And he complied, came back to the car." (Tr. at 310)

Hurrle searched the trunk area and luggage with negative results. Luedke then searched the car's interior. While searching the interior rear passenger side armrest area, Luedke testified:

> I discovered that a portion of that panel approximately ten inches by six inches appeared to be or didn't appear but physically felt like it was somewhat loose. . . . I considered it was a possibility that panel had been removed and there could be something concealed in that area.
>
> I then went to the vent area of the right rear quarter panel. That would be the area just outside of the passenger area where there's a small plastic vent cover. I then looked at the vent cover. . . . I noticed a chrome colored Phillips screw, and a closer examination of that screw indicated that there was rust in the area of the Phillips head of the screw. . . . It indicated to me that that screw had been taken out at some time. . . .
>
> I then used a small pocket type knife to remove the Phillips screw from the plastic cover, I then looked into the area of the right rear quarter panel. . . .

(Tr. at 155-56)

Luedke claimed to have seen the top portion of a bag. Reaching in, he felt a hard block substance later found to

be cocaine. Upon examining the bag's contents, petitioners were handcuffed and arrested. (Tr. at 158)

Luedke never asked permission of either petitioner to remove the screw. (Tr. at 172)

At the hearing, Petitioners requested the government to produce the screw. It was brought to court and examined by the magistrate judge. The findings were as follows: "Let me say the Court also has examined the screw, and the Court could see no evidence of rust in there." (Tr. at 424)

The magistrate judge's recommendations included the findings that there was reasonable suspicion to stop and that the petitioners were seized within the meaning of the Fourth Amendment. However, the magistrate judge found that the consent to search, given by the Petitioners, did not allow the officers to dismantle parts of the car to search for drugs, citing *United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990). (J.A. 20, 21)

The magistrate judge opined that the: "record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband." (J.A. 22) His ultimate conclusion was that there was "not probable cause to dismantle the panel." (J.A. 22) Nonetheless, the court denied the motion to suppress, noting that the drugs would have been inevitably discovered, citing *Nix v. Williams*, 467 U.S. 431 (1984). (J.A. 22, 25)

The district court, although not relying on the inevitable discovery theory, found there was reasonable suspicion to stop and that probable cause existed to search the car's body cavity. (J.A. 33-34) The court noted that the

NADDIS check was for a person whose two last names were reversed from the proper last name of the car's owner. The court reasoned that those "discrepancies as a basis for defeating probable cause introduces requirements of certainty and absolute correctness into the analysis that were expressly proscribed by the Supreme Court on *Brown v. Texas*." (J.A. 34, n.3)

The trial court also denied petitioners' request to have a joint inspection of the car at the courthouse in order that an examination of the alleged loose panel could be conducted. (J.A. 43) Petitioners entered guilty pleas reserving their right to appeal under Fed. R. Crim. P. 11(2).

The United States Court of Appeals for the Seventh Circuit rejected petitioners' contention that the correct standard of review for determinations concerning the stop and search was *de novo*. "Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; . . . " (J.A. 65)

The court also held the clear error standard of review should apply to probable cause determinations. (J.A. 68)

It characterized the courier profile as "only a little better than a dragnet for Hispanics." (J.A. 61) It reversed, because it found that the trial court could not have properly believed that the panel was loose without having either heard the testimony, inspected the car, or asked the magistrate for a specific credibility determination.

The court remanded for a specific determination whether the panel was loose. (J.A. 72-73) It held that if

the testimony of Luedke was found not to be credible, the motions to suppress should be granted. The court specifically noted "that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years." If credible, the trial court would have to determine whether the somewhat loose panel on an eleven-year-old car could transform reasonable suspicion into probable cause. (J.A. 69-70)

Upon remand, the trial court referred the remanded issue to the magistrate judge who determined that "except for the rule of *Falsus In Uno Falsus In Omnibus*, I have no reason not to believe the panel was loose." (J.A. 79) The magistrate again concluded that there was not probable cause (J.A. 80) on the basis of the somewhat loose panel, coupled with the "questionable drug courier profile," (J.A. 79) and the "convoluted and mismatched NADDIS reports". (J.A. 80)

On appeal by the Government, the district court disagreed with the magistrate and denied the motions to suppress. (J.A. 85-90) Again Petitioners instituted a second appeal arguing that *de novo* was the correct standard of review. (Main brief, filed 11-17-94, at pp. 2-6). The court of appeals' two-page order reaffirmed that its review was deferential. "The district court's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error . . . " (J.A. 92)

SUMMARY OF THE ARGUMENT

1. Appellate courts apply varying standards of review which are dependent upon whether the issue designated as one of fact, a mixed question of fact and law, or of law. Courts frequently quote *Brown v. Allen*, 344 U.S. 443, 506 (1953) for its definition of issues of fact as being "basic, primary, or historical fact: facts in the sense of a recital of external events and the credibility of their narrators." In *Townsend v. Sain*, 372 U.S. 293, 306 n.6 (1963), the Court stated, "So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense."

Once a designation of the issue as being one of fact is made, the clearly erroneous standard of review is employed. If the designation is one of law, a *de novo* review will be afforded. Mixed questions of fact and law have been generally reviewed *de novo*. The exceptions typically involve cases where the trial court is uniquely situated to evaluate credibility, demeanor, and local concerns. As such, it is said the trial court is in a better position than the appellate court to correctly determine the issue. Questions of intent to discriminate, competency to stand trial, and juror impartiality are some areas where this Court has found that deference to the trial court is warranted.

2. Historically, in the area of search and seizure, this Court has consistently applied the *de novo* standard of review. This Court has examined *de novo* appeals on direct review of state court decisions, review of lower federal courts, and habeas review of state court decisions.

Such *de novo* reviews are generally conducted with an independent assessment of the basic facts, while giving appropriate deference to credibility determinations.

3. This Court recently, in *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95), had occasion to review whether, for *Miranda* purposes, a person was "in custody." The lower federal courts held that the state court's determination that the person was not in custody was a question of fact, which merited the presumption of correctness under 28 U.S.C. § 2254(d). This Court held that the person was "in custody". An "in custody" determination was one which required the application of a set of historical facts to an objective legal standard. The ultimate question which necessitated a weighing of the "totality of the circumstances", was a question for independent review.

To determine if a person is "in custody", the court must evaluate whether a reasonable man would believe he was in custody. When trial judges engage in this type of decisionmaking process, they do so with a view to identifying recurrent patterns and advancing uniform outcomes. It is this process, through which the law is developed and refined. An "in custody" determination was deemed to be that type of issue of law which merited plenary review.

In the context of search and seizure, trial courts engage in the same process of applying a given set of facts to a "reasonable man" objective standard. In doing so, they balance whether the officer acted "reasonably" by using probable cause as the pivot between competing

interests of effective law enforcement and individual privacy interests. This process advances and refines the development of the law. Appellate courts also conduct reviews of lower court determinations with an eye for law development.

Probable cause, being of Constitutional origin, is by its very nature, a legal question as opposed to a finding of mere historical fact.

4. The Seventh Circuit's announcement in *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992), that it would treat warrant and non-warrant cases under a uniform standard of review, to wit: (clearly erroneous), ignores and undermines the rationale in *United States v. Gates*, 462 U.S. 213 (1983). In *Gates* this Court announced that in warrant cases, a trial court would be applying a more deferential standard of review, to wit: the "substantial basis" test to the magistrate's determination whether there was probable cause to issue a warrant. It did so with the expressed intent of creating an incentive for the officer to employ the warrant process, which this Court has repeatedly stated it prefers.

A deferential review ignores the underlying basis for limiting habeas review in state court search and seizure issues. In *Stone v. Powell*, 428 U.S. 465 (1976), this Court limited habeas review of state search and seizure claims by habeas corpus. It did so because it believed that the defendants had been accorded a full and fair opportunity to adjudicate their Fourth Amendment claims both at the trial court and upon review in state appellate courts. In the case at bar, the clearly erroneous standard denies the Petitioners their right to a full and fair review.

5. Mandating *de novo* review by appellate courts, will effectively force trial court judges to carefully make written findings and conclusions in federal court cases. Plenary review allows both the trial and appellate courts not merely to determine the correct legal outcome, but also to shape and enhance the development of the law. This process has the benefit of guiding lower courts, as well as law enforcement officers in carrying out their duties of protecting Constitutional rights of the citizenry at large, and carrying out the often difficult task of law enforcement.

Plenary review fosters the traditional appellate responsibilities of judicial oversight and error correction. Independent appellate court examination is consistent with a system of checks and balances, inherent in a democratic society.

ARGUMENT

I. THE STANDARD OF REVIEW HAS BEEN HISTORICALLY DEPENDENT UPON THE DESIGNATION OF APPELLATE ISSUE; I.E., FACT, LAW, OR MIXED QUESTIONS OF FACT AND LAW.

The Supreme Court has previously distinguished *de novo* review from that which is conducted through implementation of the clearly erroneous standard. In *Cooter & Gell v. Hartmarx Corp., et al.*, 496 U.S. 384, 400-401 (1990), the clearly erroneous standard was defined in the following manner:

> In practice, the "clearly erroneous" standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. See, e.g., *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-858 (1982).[1]

In *United States v. Raddatz*, 447 U.S. 667, 690 (1980), the Court stated "review *de novo*" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.

The Court has considered the appropriate standard of review in a myriad of different contexts, including civil appeals, criminal direct appeals, and federal habeas claims. In large measure, this Court, absent specific legislative directive, has on its own, determined the appropriate standard by the way in which it characterizes the

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[1] *See also, United States v. Gypsum Co., Inc.*, 333 U.S. 364, 394-395 (1948): "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

appellate issue. There have been four primary designations in this regard: historic fact, law, mixed questions of fact and law, and abuse of discretion. While the means by which the Court categorizes the individual issue is not clearly defined, the applicable standard of review is always dependent upon the designation assigned to the individual issue. Accordingly, a prerequisite to the actual review is that the Court must determine the appropriate category of each issue at bar. However, the process of categorizing the issue has not been historically easy for the Court. In *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), the Court described the particular difficulty which it encounters in differentiating between fact and law:

> The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. See *Baumgartner v. United States*, 322 U.S. 665, 671 (1944). Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.

See also, Pierce v. Underwood, 487 U.S. 552, 559 (1988). Similarly, in *Miller v. Fenton*, 474 U.S. 104, 112, 114 (1985), the problems inherent in the designation process are discussed.

Perhaps much of the difficulty in the area stems from the practical truth that the decision to label an issue a "question of law", a "question of fact", or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis.

See also, Monaghan, *Constitutional Fact Review,* 85 Colum, L. Rev. 279, 237 (1985).

The Court has, however, considered the means by which the distinction may be drawn between fact and mixed questions of law and fact. In *Townsend v. Sain*, 372 U.S. 293, 306 n.6 (1963) the Court, in reliance upon Justice Frankfurter's separate opinion, endorsed by a majority of the court in *Brown v. Allen*, 344 U.S. 443 (1953), provided the following test:

> By "issues of act" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . . " *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. (emphasis added).

The Court noted that "beyond these elemental propositions, negative in form, the Court has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.' " *Miller v. Fenton*, 474 U.S. 104, 113 (1985).[2]

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[2] The Court noted the following general principles applicable to the consideration of distinguishing fact from law: 1) " . . . an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question", *Dayton Board of Education*, 443 U.S. 523, 534 (1979), 2) The finding of intent to discriminate is subject to the clearly erroneous standard of review. *Pullman*, 456 U.S. at 288.

Once the Court finds that the subject of its scrutiny is one of fact, it will traditionally employ the clearly erroneous standard. The court in *Anderson* advised: "For these reasons, review of factual findings under the clearly-erroneous standard – with its deference to the trier of fact – is the rule, not the exception." *Anderson v. Bessemer City*, 470 U.S. at 564.

If the Court determines that the subject of review is a question of law, a *de novo* review will be afforded. *Salve Regina College v. Russell*, 499 U.S. 225, 231.

Mixed questions of law and fact have been historically examined through the regimen of a *de novo* review.[3] *Patton v. Yount*, 467 U.S. 1025, 1038 (1984), *Cuyler v. Sullivan*, 446 U.S. 345, 342 (1980), *Miller v. Fenton*, 474 U.S. 104 (1985), *Wright v. West*, 112 S.Ct. 2482, 2493-2498 (1992).

A lower court's exercise of discretion is afforded great deference and is reviewable to determine if an act

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[3] In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), this Court held, "Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is (better positioned) than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Miller v. Fenton*, 474 U.S. 104, 114 (1985); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"); *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) ("[T]he question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization").

constitutes an abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

A. FEDERAL HABEAS CLAIMS.

When Congress enacted the federal habeas legislation, it attempted to limit the depth of inquiry by mandating implementation of 28 U.S.C. § 2254(d). That provision provides, *inter alia*, that, subject to certain enumerated exceptions, federal habeas courts shall accept as correct, the factual determinations made by the state court. The section does, however, permit a federal court to determine that a state finding was "not clearly supported by the record". *Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

Generally, the "what happened" determinations, or factual issues warrant a presumption of correctness, but those ultimate determinations which present mixed questions of law and fact, the Court has declared, remain outside § 2254(d)'s domain, and is a matter of independent federal determination. *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95). The practical implementation of § 2254(d) requires that the reviewing court first conclude whether the appellate issue is one of fact, of law, or of mixed questions of fact and law. In *Brewer v. Williams*, 430 U.S. 367 (1977), the Court held that the deferential standard shall not be accorded to a challenge to a defendant's waiver to the right of counsel. Such issue, upon appeal, shall be accorded plenary review. In *Strickland v. Washington*, 466 U.S. 668 (1983), it was determined that the principles governing effective assistance of counsel claims apply in federal collateral proceedings.

Furthermore, an effective or ineffective assistance determination is not a finding of fact, but is, rather, a mixed question of law and fact. Accordingly, independent review is appropriate. In *Davis v. North Carolina*, 384 U.S. 737, 741 (1966), the court concluded:

> It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness. (Citing *Haynes v. Washington*, 373 U.S. 503, 515-516 (1963); *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960); *Ashcraft v. Tennessee*, 322 U.S. 143, 147-148 (1944).

See also, Miller v. Fenton, 474 U.S. 104 (1985).

In 1982 this court decided that the ultimate question whether a pretrial identification procedure was constitutionality impermissibly suggestive is a mixed question of fact and law which necessitated *de novo* review. *Sumner v. Mata*, 455 U.S. 591, 596-97 (1982).[4] Similarly, what constitutes voluntariness within the context of a guilty plea is subject to *de novo* review. *Marshall v. Lonberger*, 459 U.S. 431, 436-437, 442 (1983). The question whether counsel's representation of multiple defendants constituted ineffective assistance was deemed a mixed question of law and fact. *Cuyler v. Sullivan*, 466 U.S. 345, 341, 342 (1980). Most recently, it was determined that state courts "in custody"

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[4] Previously however, the court in *Neil v. Biggers*, 409 U.S. 188, 200 (1972), applied the totality of the circumstances test in determining the suggestiveness of the identification procedure. It decided that the district court's conclusions on the critical facts were unsupported by the record and clearly erroneous.

rulings do not resolve factual issues and are, instead, mixed questions of law and fact. Independent review by the federal habeas court is thereby merited. *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95). *Withrow v. Williams*, 113 S.Ct. 1745, 1754 (1993).

When historical facts are the issues before the lower tribunal, 28 U.S.C. § 2554(d) applies, thereby necessitating the implementation of the clearly erroneous standard. Those cases in which § 2254(d)'s presumption of correctness applies are heavily dependent upon the trial court's ability to appraise witnesses' credibility and demeanor, *Keohane*, at 4030.

The factual issues to which § 2254(d)'s "presumptoin of correctness" applies, includes: *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam), (competency to stand trial);[5] *Wainwright v. Witt*, 469 U.S. 412, 429 (1985), (juror impartiality, *Patton v. Yount*, 467 U.S. 1025, 1036 (1984), (juror impartiality), *Rushen v. Spain*, 464 U.S. 114, 120 (1983), (juror impartiality). *See also, Miller v. Fenton* at 114:

> When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the

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[5] The Court of Appeals on habeas review of the state court's determination of competency determined that the lower tribunal's decision was "not fairly supported by the record". *Maggio v. Fulford*, at p. 113. The Supreme Court, in reviewing the appellate decision, concluded that " . . . the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts – a prerogative which 28 U.S.C. § 2254 does not allow it". *Maggio v. Fulford*, p. 113 citing, *Marshall v. Lonberger*, 459 U.S. 422 (1983).

process of applying law to fact to the trial court and according its determinations presumptive weight.

B. CIVIL APPEALS.

The principle which establishes that the standard of review is outcome determinative of the category ascribed to the appellate issue has also been followed by this court in civil litigation. In *Salve Regina College v. Russell*, 499 U.S. 225 at 231, the Court concluded, " . . . a court of appeals should review *de novo* a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. See 28 U.S.C. § 1291."

Even in matters of civil litigation governed by Fed.R.Civ.P Rule 52(a), the Court has ruled that, in construing First Amendment issues, the following concept applies:[6]

> On the other hand, respondent correctly reminds us that in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field

[6] Fed.R.Civ.P. Rule 52(a) provides:
"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses".

> of free expression." *New York Times Co. v. Sullivan*, 376 U.S., at 284-286; *NAACP v. Claiborne, Hardware Co.*, 458 U.S. 886, 933-934 (1982); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 11 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968).

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984).

Similarly, this court articulated in *Bose* at 501, Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or finding of fact that is predicated on a misunderstanding on the governing rule of law." *See also, Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 at 885, n.15 (1982).

Issues of intent have been scrutinized as factual matters and accordingly, subject to the clearly erroneous rule. *Dayton Board of Education v. Brinkman*, 443 U.S. 536, 534 (1979); *Commissioner v. Duberstein*, 363 U.S. 278, 286 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *Pullman-Standard v. Swint*, 456 U.S 273, 288 (1982).

C. CRIMINAL APPEALS

As in the previously described federal habeas decisions, the court has applied the fact, law, mixed question of fact and law construction in designating the appropriate standard of review for direct state and federal appeals. In *Ashcraft v. Tennessee*, 322 U.S. 137, 146-47 (1944), the Court while mandating an independent examination of a state court's determination regarding the voluntariness of an alleged confession, stated:

> This treatment of the confessions by the two state courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of "independent examination" of petitioners' claims which, in any event, we are bound to make. *Lisenba v. California*, 314 U.S. 219, 237-238.

In *Haynes v. Washington*, 373 U.S. 503 (1963), the Court was presented with the following issue: Was the court precluded from reviewing the voluntariness of a confession by the verdict of the jury, which by local state practice was entrusted with the determination of voluntariness? The response was a resounding no.[7]

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[7] "Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue. It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an ***independent*** determination here, ***see e.g., Ashcraft v. Tennessee***, 322 U.S. 143, 147-148; "we cannot escape the responsibility of making our own examination of the record," *Spano v. New York*, 360 U.S. 315, 316. While, for purposes of review in this Court, the determination of the trial judge or of the jury will ordinarily be taken to resolve evidentiary conflicts and may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness, we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." ***Stein v. New York***, 346 U.S. 156, 181. *Haynes* at 515-516.

In *Ker v. California*, 374 U.S. 23 (1963), the Court held that standards of reasonableness under the Fourth Amendment are enforced against the states and the decisions of state courts which address the reasonableness of the search and seizure shall be subject to plenary review.

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental – *i.e.*, constitutional – criteria established by this Court have been respected. *Ker*, 374 U.S. at 34.

D. THIS COURT HAS HISTORICALLY AND CONSISTENTLY APPLIED A *DE NOVO* STANDARD OF REVIEW TO LOWER COURTS' CONCLUSIONS OF PROBABLE CAUSE TO SEARCH AND REASONABLE SUSPICION TO STOP.

The Court has consistently, in its review of warrantless search cases, espoused that *de novo* review is the applicable standard for appellate scrutiny. As early as 1925, this court applied the *de novo* standard in deciding the constitutional implications of probable cause, *Carroll v. United States*, 267 U.S. 132 (1925). *Carroll* presented the question whether probable cause existed for a vehicle search which resulted in the seizure of contraband. It is clear that the *Carroll* court had conducted an independent review of the issue at bar. In *Brineger v. United States*, 338 U.S. 160 (1949), the court again addressed whether arresting officers had probable cause to justify the resultant

seizure. The court in *Brineger* opined that the lower court's "finding[s]" or "conclusion[s]" concerning probable cause were "erroneous." *Brineger*, 338 U.S. at 171. *See also, Elkins v. United States*, 364 U.S. 206 (1960).[8]

The Georgia Court of Appeals in a 1980 decision determined that a stop was permissible because the subject fit a "drug courier profile". Upon conducting plenary review, in *Reid v. Georgia*, 448 U.S. 438, 441 (1980), this Court concluded " . . . that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances."

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court considered how and whether searches and seizures by public school officials were governed by the Fourth Amendment. This Court reversed the lower decision that the search of the child's purse was unreasonable. It did so after conducting an independent examination of the facts which resulted in a different legal conclusion. The *de novo* review in *T.L.O.* resulted in a reversal of the suppression order despite the fact that the state court's legal standard was "not substantially different from the standard" it has

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[8] *Cf. Elkins v. United States*, 364 U.S. 206, 223-24 (1960), this Court States:
"In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have-countenanced, nor diminished by what another may have colorably suppressed."

adopted. *New Jersey v. T.L.O.*, at 342-343. (Reasonable grounds must exist to suspect that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.)

The Supreme Court has on other occasions conducted a *de novo* review in warrantless investigatory stops. *See also, Alabama v. White*, 496 U.S. 325 (1990) and *United States v. Sokolow*, 490 U.S. 1 (1989). (This court conducted its own analysis of the facts and circumstances and reversed the legal conclusion of the court of appeals.)[9]

In *Beck v. Ohio*, 379 U.S. 89 (1964), this Court, in an analysis of whether the record below supported a finding of probable cause for arrest, reiterated its holding in *Ker v. California*, that the reviewing court must make an independent examination of the facts and findings. *Beck*, 379 U.S. at 92. The *Beck* Court then did, in fact, conduct the independent examination to which it alluded, consistent with the requirements in *Ker*.

In *Alabama v. White*, 496 U.S. 325 (1990), the Court, in consideration of an anonymous tip, warrantless investigatory stop, took great pains to conduct a thorough examination of the facts. Without deference to the trial court's determination, it independently opined that the

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[9] The court has reviewed *de novo* the existence of probable cause or suspicion in the following cases: *United States v. Sharpe*, 470 U.S. 675 (1985), (reasonable suspicion); *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) (reasonable suspicion); *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam) (reasonable suspicion); *Sibron v. New York* 392 U.S. 40 (1968) (probable cause); *Wong Sun v. United States*, 371 U.S. 471, 480 (1963)

totality of the circumstances justified the stop. *White* at 332.

In 1981, this Court again in *United States v. Cortez*, 449 U.S. 411 (1981) engaged in an exhaustive consideration of the facts developed below. This decision was clearly premised upon a *de novo* review.[10] *See also, Florida v. Rodriguez*, 469 U.S. 1, 6 (1984). (A decision in which the Court conducted an independent examination whether there was articulated suspicion to justify a seizure whether the defendant or the state must prove that a consenting defendant knew that he had the right to withhold consent.)

Since 1983, the Court has been emphatic and consistent in applying a deferential standard in reviewing the appropriation of issuance of a warrant, to wit: is there a substantial basis to conclude that probable cause existed? *Illinois v. Gates*, 462 U.S. 213, 236, 237 (1983); *Massachusetts v. Upton*, 466 U.S. 727 (1984). *See also, United States v. Ventresca*, 380 U.S. 102 (1967).

The decisions which have emanated from the Supreme Court have, as noted above, developed guiding principles for the utilization of the appropriate appellate standard. The facts, law, mixed question characterization is the pivotal consideration in determining the scope of review. This Court has uniformly, through habeas, civil

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[10] In *United States v. Cortez*, the Court considered a stop based upon articulable suspicion. Despite the clearly erroneous standard applied by the lower courts, this Court, on appeal, engaged in a *de novo* review. The Court implicitly rejected the clearly erroneous standard which was applied by the lower courts.

appeals, and direct criminal appellate review, either expressly or inferentially, applied a *de novo* review for that determination. Those opinions which address the reasonableness of a warrantless arrest or search have unfailingly ascribed to fact/law principle. There is no justifiable reason to deviate from the traditional and long recognized process as previously described herein, in the instant action. The facts and circumstances giving rise to the appeal at bar are precisely those which this court has historically construed as necessitating plenary review. While ample other independent justification exists for affording a *de novo* analysis on appeal, this Court ought to conduct an independent review to maintain the integrity and consistency of the appellate standards which it has heretofore established and to which it has historically adhered.

The Seventh Circuit decision in *United States v. Ornelas* mistakenly employs the clearly erroneous standard.[11]

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[11] Had the appeals court refrained from according deference to the decision below, and instead conducted its own independent analysis, the result would have been reversed. The seized contraband would have been suppressed.

II. THE TRADITIONAL FUNCTION OF APPELLATE REVIEW IN FOURTH AMENDMENT REASONABLE SUSPICION AND PROBABLE CAUSE TO SEARCH CASES REQUIRES APPELLATE COURTS TO APPLY A *DE NOVO* STANDARD OF REVIEW.

A. SINCE FINDINGS OF PROBABLE CAUSE AND REASONABLE SUSPICION CONSTITUTE LEGAL CONCLUSIONS, A *DE NOVO* STANDARD OF REVIEW IS NECESSARY.

In a newly announced Fifth Amendment case, *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95) this Court was presented with the question "whether state-court 'in custody' determinations are matters of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d), or mixed questions of law and fact warranting independent review by the federal habeas court." *Thompson* (64 U.S.L.W. 4031). The state trial and appellate courts found that Thompson was not in custody when he confessed.

Thompson filed a petition for a writ of habeas corpus in the United States District Court for the District of Alaska. That court denied the writ and accorded the presumption of correctness under 28 U.S.C. § 2254(d) to the state courts' findings that Thompson was not in custody for *Miranda* purposes when he made the confession. The reviewing federal court agreed.

This Court found that "the issue whether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review." *Thompson* (64 U.S.L.W. 4027). In so doing, the Court initially had to define "issue of fact." It

looked to *Townsend v. Sain*, 372 U.S. 293 (1963), which provided the foundation for § 2254(d).

This Court stated, citing *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980), " 'the ultimate question' – requiring a 'totality of the circumstances' assessment – 'is a matter for independent federal determination.' " *Thompson* (64 U.S.L.W. 430). As noted in an earlier section of this brief, a number of exceptions to this general rule exist, which are premised upon the superior ability of the trial court to correctly decide the ultimate issue. These often involve issues of credibility of witnesses and first hand observations by the trial court. Thus, the error correcting functions of appellate review are limited.

When applying a uniform objective standard to a set of historical facts, a legal conclusion emerges. In *Keohane*, respondents argued that "reasonable person" assessments, a determination which must be made in a negligence action and which is most prominently in the field of torts, remains with the finder of fact. This Court stated, in n.13, that the fundamental difference in the assessment of a "reasonable person" determination and the assessment of whether someone is in custody, is that the latter is done "with a view to identifying recurrent patterns, and advancing uniform outcomes. If they cannot supply 'a definite rule' they nonetheless can reduce the area of uncertainty."

Further, in most tort actions, the finder of fact is not developing the law. The *Keohane* Court concluded that " . . . the crucial question entails an evaluation made after determination of those circumstances: if encountered by a 'reasonable person,' would the identified circumstances

add up to custody as defined in *Miranda*?" *Keohane* (64 U.S.L.W. at 4031). It is this valuative process, which serves the purpose of furthering the development of the law and which makes the issue of custody a legal determination and not fact.

By classifying the question as one subject to plenary review, legitimate law enforcement interests are served because "the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law." *Keohane* (64 U.S.L.W. at 4032).

The Fourth Amendment probable cause and reasonable suspicion cases similarly employ a reasonable man standard. The policy reasons why the "in custody" determination should be subject to plenary review, apply with equal force in the Fourth Amendment context. Foremost, it is in the exercise of judgement, where appellate courts apply a given set of facts to the Constitutional norms, weigh the relative values of those norms against the imperatives of effective law enforcement, and articulate a rule or set of rules to guide future behavior.[12]

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[12] Justice Scalia, in *The Rule of Law as a Law of Rules*, 85 University of Chicago L. Rev., 1175, 1180-81 (1989), "suggest[s] that when an appellate judge comes up with nothing better than a totality of circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding." He applies this analysis to the law of torts and the reasonable man standard.

Pressing further, Justice Scalia asks, at 1181: "Why should the question whether a person exercised reasonable care be a question of fact, but the question whether a search or seizure was reasonable be a question of law? The latter, like the former, lends itself to ordination by rule *up to a point*." One answer,

B. MANDATING *DE NOVO* REVIEW IN NON-WARRANT CASES WILL REQUIRE THE LOWER COURTS TO FULFILL THEIR TRADITIONAL APPELLATE RESPONSIBILITIES OF JUDICIAL OVERSIGHT, ERROR CORRECTION, AND LAW DEVELOPMENT.

Salve Regina College v. Russell, 499 U.S. 230 (1991) mandated federal appellate courts to review *de novo* a district court's determination of state law. Citing 28 U.S.C. §1291, the *Russell* Court noted that, as a general rule, courts of appeal have plenary authority over decisions of district courts. The Court also stated, "Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Russell*, 499 U.S. at 231.

The Court fully recognized that trial courts preside alone over fast-paced trials, and are occupied by the exigencies of conducting trials. Similarly, the "logistical burdens of trial advocacy" limit trial counsel's abilities to supplement the trial court's own research with briefs. *Russell*, 499 U.S. at 231. The Court acknowledged that

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Justice Scalia suggests, is that juries cannot be trusted to make the determination of whether the search was reasonable when the defendant is obviously guilty. "Perhaps, then, the answer is that 'reasonable search' is a *constitution* standard, and whether such a standard has been met *must* be left to the judges." *Id.* at 1182. He does not know why some questions are treated as fact and others as law. " . . . [T]hough I imagine that their relative importance to our liberties has much to do with it." *Id.* at 1182.

Not unlike this Court's decision in *Keohane*, Justice Scalia suggests "the establishment of broadly applicable general principles is an essential component of the judicial process." *Id.* at 1185.

trial courts "often must resolve complicated legal questions without benefit of 'extended reflection [or] extensive information.' " *Id.* at 232.

The *Russell* Court, at 232, stated that appellate courts are "structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to the legal issues." With further and more refined briefing, a fuller analysis will emerge than that which was in the trial court. "Perhaps most important, courts of appeals employ multijudge panels . . . that permit reflective dialog and collective judgment." *Russell*, 499 U.S. at 232.

Not only does *de novo* review often promote decisional accuracy making at the appellate level, such application "should encourage a district court to explicate with care the basis for its legal conclusions." *Russell*, 499 U.S. at 233.

Appellate courts are far more likely to have a keener appreciation for the more subtle aspects of fairly complicated Fourth Amendment jurisprudence by virtue of the fact that legal reviews are their principal function. Case by case evaluation of closely related fact situations allows appellate courts to develop the law, describe limits, and guide lower courts and law enforcement authorities. This Court has looked at a number of cases involving airport and border searches in an attempt to develop a national policy to address a national problem of drug importation and illegal immigration.

Further, the development of objective standards, that is, what a reasonable person would believe, "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).

Plenary review fosters the orderly development of the law, by reducing conflicting decisions of lower courts. It promotes consistency and uniformity in law development. Since this Court hears only a small fraction of the cases which are heard by federal courts of appeal, the lower appellate tribunals are relegated the primary responsibility of delineating with particularity, the confines of specific Fourth Amendment issues. It is therefore important that lower appellate courts have direction from this Court in exercising their collective judgment in defining and declaring Fourth Amendment jurisprudence. As a corollary, it is essential that lower appellate courts have the independence to exercise their appropriate appellate responsibilities.

The development of the law can be best served when the focus of appellate review is upon the reasonableness of the particular conduct which gives rise to the search or seizure. It is far less productive for the development of consistent and predictable applications of the law, to have the appellate analysis emphasis a means by which to establish some basis for sustaining the decision below.

To adhere to a clearly erroneous standard of review in non-warrant cases would produce the anomalous result of a lone trial judge exerting its view of Fourth Amendment law upon the collective wisdom of three panel appellate courts, if there is some basis to sustain

the decision. Indeed, the appellate courts may well have decided the case differently. While a clearly erroneous standard of review is appropriate for factual findings, there is no considered justification for this standard in search and seizure legal determinations.

Deferential review of legal issues, especially in the search and seizure context, is contrary to one of the central values of a democratic society. Decision-making should be subject to full and meaningful checks and balances. If it is not, it is akin to a tyranny of mediocrity.

The constitutional core values, implicit in the concept of probable cause, require the protections which plenary review fosters.

III. THE CLEARLY ERRONEOUS STANDARD IN NON-WARRANT CASES IS CONTRARY TO THE POLICY OBJECTIVE ENUNCIATED IN *GATES*.

Illinois v. Gates, 462 U.S. 213 (1983) abandoned the two-pronged test concerning an informant's veracity and reliability and reaffirmed the totality of the circumstances test as the basis for the issuance of a warrant. *Gates* noted that warrants are often drafted by non-lawyers in the midst and haste of a criminal investigation. Such persons do not keep abreast of each judicial refinement of the nature of probable cause. The Court stated that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232.

The rule which the *Gates'* decision pronounces was that: "after-the-fact scrutiny by courts of the sufficiency of the affidavit should not take the form of *de novo* review." *Gates*, 462 U.S. at 236. The *Gates* Court reaffirmed, at 212, that there should not be "A grudging or negative attitude by reviewing courts toward warrants," citing *Ventresca*, 380 U.S., at 108. Failure to give deference is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Gates*, 462 U.S. at 236.

The *Gates* Court gave further evidence of its intent to give deference to the magistrate's decision when the officer makes a determination to apply for a warrant. "Reflecting this strong preference for the warrant process, the traditional standard of review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates* at 236. This standard "serves the purpose of encouraging recourse to the warrant procedure . . . " *Gates*, 462 U.S. at 237.

In *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992), the United States Court of Appeals for the Seventh Circuit announced that it would apply the clearly erroneous standard of review to both warrant and non-warrant cases. *Spears* was cited as the basis for applying the clearly erroneous standard in this case. (J.A. 68) The rationale in *Spears*, at 270-71, was as follows:

> It would be anomalous to require a more searching review of a district judge's probable cause

> determination, made after a full adversary proceeding . . . Because there is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a nonwarrant case, appellate review should be the same for both. In warrant cases, the magistrate is the front-line judicial officer making the initial determination. In non-warrant cases, it is the district judge who makes the initial determination, who asks the same question the magistrate asks in a warrant case: is there probable cause . . . If there is probable cause, the scope of the search without a warrant is no greater than one with a warrant . . . It is the frontline officer in both cases who conducts the initial inquiry, who concludes there is or there is not probable cause, and an appellate panel should not substitute its judgment in either case.

In announcing that the standard of review in warrant and non-warrant should be the same, the *Spears* court ignored the essential rationale in *Gates*, which was to promote the warrant process. The *Spears* panel justified this decision, in part, by asserting that the scope of the search with or without the warrant would be the same. This analysis ignores a practical premise historically espoused by this Court, that the magistrate is a gatekeeper, to prevent unwarranted Fourth Amendment intrusions. More particularly, the magistrate serves to screen applications for warrants which fail to articulate probable cause; limit the scope of the proposed search; and prescribe the terms and conditions upon which such search shall be carried out.

Those two factors reflect this Court's long stated belief that the magistrate should stand between the police officer's zeal in law enforcement and the privacy interests of the individual to be free from arbitrary police conduct. *Gates* rewards the officer who took the time to secure the warrant by reaffirming, "resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

Further, this Court has recognized that once a warrant is procured, intrusion upon interests protected by the Fourth Amendment are less severe. *Gates*, 462 U.S. at 237 n.10. By making the standard of review the same for warrant and non-warrant cases, the *Spears* court seriously erodes the incentive to procure the warrant by police and prosecutors.

The *Spears* court also justified its decision by listing other areas in which it has applied the clearly erroneous standard. The list included exigent circumstances, citing to a 1991 Seventh Circuit case. *Spears*, 965 F.2d at 271. This reliance is similarly misplaced. In *Minnesota v. Olson*, 495 U.S. 91, 100 (1990), the Court conducted a *de novo* review involving a "fact-specific application of the proper legal standard" to the question whether exigent circumstances existed.

There was no deference in *Olson* to the lower court's legal finding despite that independent review resulted in affirmance of the decision below. The *Spears* decision, which places emphasis on the district court's position as a front line adjudicator during the conduct of a probable

cause hearing, is inconsistent with the practical functioning of many federal jurisdictions. In various districts, a suppression hearing is conducted entirely before the magistrate-judge. The district court often hears none of the testimony, although may review the recommendations *de novo* upon petition by either party. This Court has stated, however, that such a *de novo* "determination" may be made merely upon a review of the record, that is, the filed objections and transcripts. The trial court is not obligated to have the witness appear before it to resolve disputed facts or credibility concerns. *Raddatz*, 447 U.S. 667 (1980).

In the instant action, deference is particularly undesirable given that the trial court twice overruled its magistrate's recommendation of no probable cause. Further, the district judge overruled the magistrate's findings which resulted from four days of hearings. The district judge, in its initial review of the magistrate's decision, failed to obtain the complete transcripts of the hearing. Instead, it relied upon a single transcript of Deputy Luedke. (J.A. 29, n.1) (R.44, 45, 46, 47). The full transcripts were not filed until late June, 1993, more than three months after the trial court denied petitioners' motions to suppress). Without question, the district court failed to consider the totality of the circumstances. It accordingly failed in its duty to "decide such motion based on the record developed before a magistrate . . . " *United States v. Raddatz*, 447 U.S. 667, 669 (1980).

In *Spears*, four judges dissented from the denial of a rehearing en banc. In a strongly worded opinion, the dissenters pointed out that the newly created clearly erroneous rule was not applied at the urging of any party and

was made without the benefit of briefing or oral argument. The dissent noted that in warrant situations, application of clearly erroneous standard will "weaken the fabric of *Gates* and *Leon*." *Spears*, 965 F.2d at 283. Finally, the divergent view argued that this approach forsakes the appellate courts' responsibility to interpret and uphold the Constitution.

The *Spears* court also ignored the rationale in *Stone v. Powell*, 428 U.S. 465 (1976), which limited habeas review by state court defendants in search and seizure claims. *Powell* precluded habeas review "by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct appeal." *Powell*, 428 U.S. at 486. It is self evident that the presumption in the limitation for state search and seizure habeas applications is that the defendant has had "a full and fair consideration" of the issue both at trial and on appeal. Any less than a *de novo* review would deny the litigant the full and fair consideration to which the Court alluded to in *Powell*.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed and the case remanded to that court for a proper determination of petitioners' suppression motions under the *de novo* standard of review.

Respectfully submitted,

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